80-2149

Office-Supreme Court, U.S.
FILED
JUN 17 1981
ALEXANDER L. STEVAS,
CLERK

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COASTAL STATES CRUDE GATHERING COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID S. GAMBLE,
WOODARD, HALL & PRIMM
300 Esperson Building
Houston, Texas 77002
(713) 224-5171

Attorneys of Record for Petitioner, Coastal States Crude Gathering Company

QUESTIONS PRESENTED FOR REVIEW

1. Does the enforcement of a monetary penalty against Coastal States Crude Gathering Company pursuant to 33 U.S.C. § 1321(b)(6) for a discharge of gasoline resulting solely from the acts of an unknown third party violate the Fifth Amendment of the United States Constitution's guaranty of substantive due process, depriving Coastal States Crude Gathering Company of property without due process of law?

2. Does the standard established by the United States Supreme Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 633 (1974) for the review of cases involving the forfeiture of property in the light of substantive due process apply with equal force in such cases as this one in which a so-called civil penalty is sought to be imposed as a result of circumstances caused solely by the acts of an unknown third party?

LIST OF PARTIES

All the parties to the proceeding in the District Court and the Court of Appeals are listed in the caption of the case in this Court. Supreme Court Rule 28.1 requires that a Petition filed on behalf of a corporation shall include a list naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of such corporation. Accordingly, a comprehensive list of corporations affiliated to Coastal States Crude Gathering Company is reproduced in Appendix "E".

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	ii
REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS AND STATUTES	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
APPENDIX "A"	A-1
APPENDIX "B"	B-1
APPENDIX "C"	C-1
APPENDIX "D"	D-1
APPENDIX "E"	E-1

TABLE OF AUTHORITIES

Statutes and Rules

28 U.S.C. § 2101 (c) 1
28 U.S.C. § 1254 (1) 1
33 U.S.C. § 1321 (b)(3) 2, 7, 8
33 U.S.C. § 1321 (b)(6) 2, 4, 7, 8
33 U.S.C. § 1321 (f) 7
33 U.S.C. § 1321 (g) 8
33 U.S.C. § 1321 (i) 8
33 U.S.C. § 1321 (j) 8
33 U.S.C. § 407 .....
SUP. CT. R. 20.4 1
SUP. CT. R. 17.1(c) 1

Cases

Armstrong v. *United States*, 364 U.S. 40, 49 (1960) 14
Calero-Toledo v. *Pearson Yacht Leasing Company*, 416 U.S. 663 (1974) 1, 12
Edelberg v. *Illinois Racing Board*, 540 F.2d 279 (7th Cir. 1976) 12
Nebbia v. *New York*, 291 U.S. 502 (1934) 8
One Lot Emerald Cut Stones v. *United States*, 409 U.S. 232 (1972) 11

United States v. *Atlantic Richfield Company*, 429 F. Supp. 830 (E.D. Pa. 1977) 9
United States v. *Chevron Oil Co.*, 583 F.2d 1357 (5th Cir. 1978) 9
United States v. *Eureka Pipeline*, 401 F. Supp. 934, 940 (N.D. W.Va. 1975) 11
United States v. *Marathon Pipeline Co.*, 589 F.2d 1305 (7th Cir. 1978) 9
United States v. *One 1975 Pontiac Lemans*, 621 F.2d 444 (1st Cir. 1980) 16
United States v. *$6,700*, 615 F.2d 1 (1st Cir. 1980) 16
United States v. *Tex-Tow, Inc.*, 589 F.2d 1310 (7th Cir. 1978) . 9

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

1) The opinions of the Coast Guard hearing officer and chief counsel are unreported, but those opinions are reproduced in Appendix "A".

2) The District Court's Memorandum and Order and Final Judgment were also unreported, but they are reproduced in Appendix "B".

3) The decision of the United States Court of Appeals for the Fifth Circuit is reported at 643 F.2d 1128 (5th Cir. 1981), and that opinion is reproduced in Appendix "C".

JURISDICTIONAL STATEMENT

The Court of Appeal's decision sought to be reviewed herein was dated and entered April 27, 1981. An Order denying rehearing en banc was entered on May 21, 1981. Accordingly, Coastal's Petition for Writ of Certiorari is timely pursuant to 28 U.S.C. § 2101(c) and SUP. CT. R. 20.4.

The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1) and the case is appropriate for review on certiorari under SUP. CT. R. 17.1(c). The Court of Appeals has decided a federal question in conflict with the decision of this Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the application of the Fifth Amendment of the United States Constitution and 33 U.S.C. §§ 1321(b)(3) and (6). The text of those provisions is reproduced in Appendix "D".

STATEMENT OF THE CASE

The United States of America ("Respondent") brought an action against Coastal States Crude Gathering Company ("Coastal") in the District Court of the United States for the Southern District of Texas, Corpus Christi Division, for a violation of the Federal Water Pollution Control Act Amendments of

1972, 33 U.S.C. § 1321(b)(3). Respondent sought to enforce a $5,000 "civil" penalty against Coastal pursuant to 33 U.S.C. § 1321(b)(6). 33 U.S.C. § 1321(b)(6), reproduced in Appendix "D", provides for the assessment of a civil penalty of up to $5,000 for each violation of 33 U.S.C. § 1321(b)(3), also reproduced in Appendix "D", by any owner, operator or person in charge of an on-shore facility, off-shore facility or vessel from which oil or a hazardous substance has been discharged.

The circumstances underlying Respondent's attempt to enforce a monetary penalty against Coastal are straightforward, well documented and undisputed. An excellent exposition of the facts is contained in the panel's opinion by Judge Politz.

> Both parties agree that there is no genuine issue as to any material fact in this case. On or about June 7, 1977, approximately 5,200 barrels of gasoline were discharged into Nueces Bay, near Corpus Christi, Texas, from a product pipeline known as the Houston 12" Pipeline owned and operated by Coastal. The gasoline escaped from the pipeline through a small "hairline" fracture at a point well outside the navigation channel in Nueces Bay. At the point of the fracture in the pipeline, Nueces Bay was at least four feet deep, and the pipeline was buried at a depth of at least three feet below the bottom of the bay. The pipeline in question had been installed by Coastal in accordance with all applicable governmental regulations and standard industry practice.
>
> It seems that the discharge resulted solely from the acts of an unknown third party. Inspection of the pipeline, conducted immediately after the discharge was discovered, revealed that the leak was caused when the pipeline was struck by a vessel owned by an unknown third party traveling well outside the navigation channel in Nueces Bay. The vessel struck the pipeline with enough force to penetrate the two inches of concrete in which the pipeline had been encased and to dent and gouge the body of the pipe.

Although not specifically mentioned in the opinion, additional undisputed facts were contained in the uncontroverted Affidavit

of Defendant Coastal States Crude Gathering Company in Support of its Motion for Summary Judgment that was filed in the District Court.

> The flow of gasoline through the pipeline was shut off immediately upon learning of the discharge, and t. line was pumped full of water. Although clean up was unnecessary due to dissipation and evaporation, Coastal States Crude Gathering Company did incur expenses in the neighborhood of $100,000 in lost product and in repairing the pipeline and recommitting it to service.

Both Respondent and Coastal filed motions for summary judgment. On April 11, 1980 Judge Owen Cox issued a Memorandum and Order and entered a Final Judgment for Respondent against Coastal for a monetary penalty of $5,000 together with interest and costs.[1] Judge Cox's Memorandum and Order and Final Judgment are reproduced in Appendix "B".

Coastal filed its notice of appeal, appealing to the United States Court of Appeals for the Fifth Circuit from the Final Judgment, and the record was filed in the United States Court of Appeals for the Fifth Circuit and docketed as No. 80-1533. A panel consisting of Judges Ingraham, Politz and Williams heard oral argument in the case on March 26, 1981. The panel entered its judgment and issued its opinion on April 27, 1981. A copy of that opinion is reproduced in Appendix "C". The Court of Appeals noted that the Respondent brought suit to recover a "civil" penalty in the amount of $5,000 despite the fact that the Secretary had originally assessed a penalty in the amount of only $1,000. The District Court's judgment was amended to assess a penalty in the lower amount.

---

[1] Federal Jurisdiction in the court of first instance, the District Court, was based on 28 U.S.C. §§ 1345 and 1355.

As the District Court's Memorandum and Order and the Court of Appeals' Opinion reflect, both courts understood Coastal's contention that the imposition of a monetary penalty on Coastal for a discharge of gasoline into the navigable waters of the United States resulting solely from the acts of an unknown third person violates the Fifth Amendment proscription against the taking of property without due process of law. Similarly, both courts considered the legislative purpose behind the enactment of 33 U.S.C. § 1321 (b)(6), to be a "revenue" or "financial" purpose associated with the support of a revolving fund maintained by the government to defray the costs of administration and enforcement of the regulatory scheme established by the Federal Water Pollution Control Act Amendments of 1972. In analyzing the undisputed facts of the case, neither court applied the substantive due process standard announced by this Court in the *Calero* case in order to determine whether or not the legislative means, embodied in the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1321 (b)(6), bore a reasonable relation to a proper legislative purpose and was neither arbitrary nor discriminatory.

In either ignoring or considering and rejecting this Court's holding in the *Calero* case, both the District Court and the Court of Appeals decided an important question of federal law in a way in conflict with an applicable decision of this Court.

SUMMARY OF ARGUMENT

This case is of a type appropriate for the granting of a Petition for Writ of Certiorari. The propensity of Congress to create administrative and enforcement schemes partially or fully funded by the assessment of civil penalties is clearly evident in the Federal Water Pollution Control Act Amendments of 1972 and in various other pieces of regulatory legislation. To the extent that the penalty provisions of those congressional enactments sweep broadly enough to provide for the assessment of a penalty against one person for an event arising solely from the acts of some other person, serious constitutional questions are raised concerning the constitutional validity of the statute as applied in those circumstances. The resolution of those consitutional questions in the light of established substantive due process standards is of supreme importance to the continued administration of any regulatory scheme, such as this one, containing such broadly worded penalty provisions.

The particular penalty provisions contained in the Federal Water Pollution Control Act Amendments of 1972 have not been considered by this Court under circumstances involving the assessment of a penalty for an event arising solely from the acts of some third person. The substantive due process test announced by this Court in the *Calero* case has been either ignored or considered and rejected in the courts below. The existence of an important constitutional question, an issue of great significance in the administration of the statutory scheme, and an actual conflict between the decisions of the courts below and a controlling decision of this Court make this case, based on an undisputed set of facts, one appropriate for review upon Petition for Writ of Certiorari.

Whether the monetary penalty sought to be imposed on Coastal pursuant to 33 U.S.C. § 1321(b)(6) is a "civil" or "criminal" penalty, it amounts to a forfeiture and a taking of

property. In this case, the property sought to be forfeited and taken is the amount of the penalty. Cases in which penalties are sought to be imposed or forfeitures are sought to be applied that involve the conduct of third parties have historically been subjected to close constitutional scrutiny, and special considerations apply in such cases.

Congress' stated object in enacting the Federal Water Pollution Control Act Amendments of 1972 was to prevent and proscribe the discharge of oil or hazardous substances into or upon the navigable waters of the United States. Here the discharge resulted solely from the act of an unknown third party, an act Coastal, therefore, could not reasonably have been expected to prevent. Under these circumstances the application of a forfeiture or the imposition of a penalty would have no real or substantial relation to the deterrent, punitive, retributive or regulatory object of Congress.

Further, it makes no difference to what purpose the property or its proceeds will be applied after forfeiture. If raising revenue is perceived as the primary purpose of the penalty, in the absence of any rational connection between the imposition of a penalty and some regulatory purpose, then selecting Coastal to pay and to forfeit property is both arbitrary and discriminatory.

In short, the application of the so-called "legislative means," the imposition of a civil penalty upon the owner of a facility from which a hazardous substance is discharged, is unreasonable, arbitrary and capricious and bears no reasonable relation to a proper legislative purpose when the owner of the facility had done all that reasonably could have been expected to prevent the discharge in question.

Once it is determined that the discharge resulted *solely* from the acts of a third party, the constitutional inquiry is over. The provisions of 33 U.S.C. § 1321(b)(3) and (6) are unconstitutional as applied to the circumstances of this case and Coastal is entitled to judgment as a matter of law.

ARGUMENT

1. The Enforcement Scheme

When Congress passed the Federal Water Pollution Control Act Amendments of 1972, its purpose was unambiguous. In fact, Congress stated its object in the body of the statute at 33 U.S.C. § 1321(b)(1), *inter alia:*

> The Congress hereby declares that it is the policy of the United States *that there should be no discharges* of oil or hazardous substances into or upon the navigable waters of the United States . . . (Emphasis added)

In order to accomplish its stated object, Congress enacted an enforcement scheme comprising several different approaches to enforcement and sanction. In 33 U.S.C. § 1321(b)(3), Congress enacted a prohibition against the discharge of oil or hazardous substances into or upon the navigable waters of the United States. Under 33 U.S.C. § 1321(b)(6), the provisions sought to be applied here, the owner, operator or person in charge of any onshore or offshore facility from which oil or hazardous substance is discharged in violation of Subsection (b)(3) is assessed a monetary penalty of not more than $5,000 for each discharge without regard to fault and subject to no defenses. Discharges occurring after the amendments of November 2, 1978 are subject to civil penalties for violations of 33 U.S.C. § 1321(b)(3) of up to $250,000 under certain circumstances involving a consideration of the "standard of care" or the "willful negligence or willful misconduct" of the person being charged with the violation. 33 U.S.C. § 1321(b)(6)(B) (Supp. 1980). In addition, owners and operators of discharging facilities are liable for cleanup costs subject to certain defenses (33 U.S.C. § 1321(f)), are required to notify the Coast Guard of discharges from their facilities immediately subject to a penalty of not more than $10,000 and imprisonment for one year for failure to report (33 U.S.C. § 1321(b)(5)), and are entitled to recover cleanup expenditures under certain circumstances against third parties

(33 U.S.C. § 1321(g)), and against the United States (33 U.S.C. § 1321(i)). Further, owners and operators are subject to a monetary penalty of not more than $5,000 for each violation of any regulations established by the President designed to facilitate the accomplishment of Congress' object. 33 U.S.C. § 1321(j).

2. Coastal's Challenge

Out of all of this collection of enforcement provisions designed and enacted to accomplish Congress' stated purpose of preventing discharges of oil or hazardous substances, Coastal challenges only 33 U.S.C. § 1321(b)(3) and (6) as applied. Coastal respectfully asserts that 33 U.S.C. § 1321(b)(3) and (6), insofar as they are applied here to impose a monetary penalty upon Coastal for a discharge resulting solely from the act of an unknown third party, are unconstitutional and are a violation of the Fifth Amendment of the United States Constitution and its prohibition against the taking of property without due process of law. There is no dispute that the discharge in question resulted solely from the acts of an unknown third party. The District Judge so stated in his Memorandum and Order. In spite of this clear recognition of the circumstances of the discharge, the District Court granted the Respondent's Motion for Summary Judgment and denied Coastal's as a matter of law. The facts of this case bring clearly into focus the question of the requirements of substantive due process when a penalty or a forfeiture is sought to be imposed for an occurrence resulting *solely* from the acts of a third party.

Certainly, both Respondent and Coastal understood that substantive due process was a consideration in this case, because both parties cited the landmark case of *Nebbia* v. *New York*, 291 U.S. 502 (1934) in their initial briefs in the District Court. *Nebbia*, in broad terms, outlines the scope of substantive due process. In his often quoted opinion, Justice Roberts stated, *inter alia:*

> . . . [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

Id. at 525. Later in the opinion Justice Roberts elaborated:

> If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a Court functus officio.

Id. at 537.

The Supreme Court in *Nebbia* quite properly adopted a deferential stance toward the enactments of the state legislature, sustaining legislative regulation of milk prices against a retailer's assertion of freedom of contract and property right claims. *Nebbia* involved the enforcement of a regulation against the behavior of the particular person whose conduct (the overpricing of groceries) the legislature sought to proscribe. No third person was involved.

The Memorandum and Order issued by the District Court did not cite *Nebbia.* Instead, it cited four principal cases involving challenges to penalties imposed under Subsection (b)(6), the Subsection in question in this case. In particular, the District Court cited *United States* v. *Chevron Oil Co.*, 583 F. 2d 1357 (5th Cir. 1978) (a case concerning the test for determining whether a discharge was in "harmful quantities" and in which no third person was involved), *United States* v. *Atlantic Richfield Company*, 429 F. Supp. 830 (E.D. Pa 1977) (a case in which no third person was involved), *United States* v. *Tex-Tow, Inc.*, 589 F. 2d 1310 (7th Cir. 1978) (a case in which a third person was arguably involved), and *United States* v. *Marathon Pipeline Co.*, 589 F. 2d 1305 (7th Cir. 1978) (a case in which the act of a third person was squarely drawn into question).

The Court of Appeals on the other hand cited *Nebbia* and expressly sought to apply its substantive due process test. The only other case cited by the panel was *Marathon Pipeline Co.*, cited as authority in Judge Cox' Memorandum and Order.

Of the authorities cited by either the District Court or the Court of Appeals, the cases most closely analogous to the facts of this case are the two cases from the Seventh Circuit, *Marathon Pipeline Co.* and *Tex-Tow, Inc.* Both opinions issued on the same day from the same panel. *Marathon* involved a discharge resulting from damage to a pipeline caused by a bulldozer owned and operated by a third party who had been misinformed about the location of the pipeline by a landowner. *Tex-Tow* involved a discharge resulting from a puncture that occurred when a barge that was being filled with gasoline settled onto an underwater steel piling. In each case, the court upheld the imposition of the penalty. Judge Castle wrote the opinion for the court in both cases, and the opinions rest upon similar logic. In short, Judge Castle believed that the statute and the penalty had an economic rationale. He reasoned that Congress had determined that the owners of facilities from which discharges occurred would be called upon to support a revolving fund to be used to finance the containment, disbursal and removal of spills and the administrative and bureaucratic costs associated with enforcement. *Marathon Pipeline Co.* at 1309; and *Tex-Tow, Inc.* at 1315.

Of the three judges who heard both *Tex-Tow* and *Marathon*, Judges Wood and Bauer wrote concurring opinions in the *Marathon* case (adopted in the *Tex-Tow* case) expressing their displeasure with the results. Judge Wood wrote at 1310:

> As I believe Judge Castle has correctly analyzed the applicable law I join in his opinion, but as a matter of principal do so with some reluctance.
>
> The company which will have to pay this fine can no doubt do so without any economic pain. I recognize, however, no justification for the basic unfairness it involves.

> The company is concedely not guilty of the slightest fault. It in no way caused the accident, except it was in business. Just being in the business of supplying critical energy or other needs for our society scarcely justifies this type of penalty being imposed by someone in a government agency. I fail to see how it will deter or remedy anything . . . Little good can be accomplished in these particular circumstances by this unusual process which is generally considered to be contrary to the accepted principals of law and equity.

Similarly, Judge Bauer stated at 1310:

> I too believe that Judge Castle has correctly decided the matter before us as a matter of law and I concur in his opinion. While I also agree that the responsibilities of this Court go no further than such a legal analysis — without contested facts — I am also joining in Judge Wood's concurring remarks. It seems to me that the Coast Guard, having been given such a fantastic amount of leeway by the Congressional action involved, should pay closer attention to the purposes for which the legislation was passed — environmental protection. To punish a business engaged in enterprises essential to our national well-being for an unfortunate accident when the business is faultless, seems to be a self-defeating exercise of power. "Strict liability" concepts normally refer to *compensation*, not punishment without fault.

Judges Wood and Bauer concurred in the result as a matter of law, and, indeed, Judge Castle cited three cases in support of the imposition of such a monetary penalty. The three cases he cited involve forfeitures imposed as a result of a regulatory scheme. Forfeiture cases are not merely analogous but are precisely on point, because the imposition of a monetary penalty amounts to nothing more than a forfeiture. The first case cited by Judge Castle for the proposition that substantive due process had been satisfied was *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972), a case that had been cited in *United States* v. *Eureka Pipeline Company*, 401 F. Supp. 934, 940 (N.D. W. Va. 1975), one of the earliest cases to consider the Subsection (b)(6)

penalty and the revolving fund. *One Lot Emerald Cut Stones* was cited for the proposition that the concept of financing regulation through a penalty or forfeiture imposed on regulatees is neither novel nor, without more, constitutionally offensive; but that case involved the forfeiture of certain precious stones and a ring owned by the person who actually attempted to carry the property through customs without declaring it, in violation of the United States Customs laws. No third person was involved. The second case was *Edelberg* v. *Illinois Racing Board*, 540 F. 2d 279 (7th Cir. 1976), a case in which racing winnings paid to the owner of a winning horse were forfeited because it was determined that the horse had been drugged. Although the owner deprived of the purse had not been responsible for the drugging, the question was not precisely one of third party action. In fact, applicable rules determined that a drugged horse could not lawfully be declared the "winner" of a race. The third case cited by Judge Castle in each opinon, a case which Coastal submits is not only dispositive but also marks the outline of substantive due process in cases in which the event sought to be regulated resulted solely from the act of a third party, was *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

3. Substantive Due Process Analysis

In *Calero* the owner of a yacht voluntarily entrusted its possession to third persons who used it to smuggle drugs. At the conclusion of his opinion, Justice Brennan, for the Court, outlined significant limitations on the constitutional vitality of forfeiture statutes.

> This is not to say, however that the "broad sweep" of forfeiture statutes remarked in *Coin and Currency* could not, in other circumstances, give rise to serious constitutional questions. Mr. Chief Justice Marshall intimated as much over a century and a half ago in observing that *"a forfeiture can only be applied in those cases in which the means that are prescribed for the prevention of a forfeiture*

> *may be employed."* . . . [Citation] . . . . it therefore has been implied that it would be difficult to reject the constitutional claim of *an owner whose property subjected to forfeiture had been taken from him without his privity or consent* . . . [Citations] . . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he *had done all that reasonably could have been expected to prevent the proscribed use of his property;* for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive. *Cf., Armstrong* v. *United States,* 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960). (Emphasis added)

Calero at 690.

The analysis employed by Justice Brennan in *Calero* is much narrower and more clearly applicable than the broader test of *Nebbia,* but what could be more unreasonable, arbitrary, or capricious and what could bear a less substantial relation to the clearly stated object of Congress than to apply a forfeiture or enforce a penalty against one person for a discharge that "resulted solely from the acts of an unknown third party?" *See,* Judge Cox's Memorandum and Order reproduced in Appendix "B".

Clearly the object of Congress is to prevent discharges. Once that is established, the substantive due process test of *Calero* need only be applied. If the discharge in question resulted solely from the act of an unknown third party and in no way resulted from an omission on the part of Coastal, then certainly Coastal did all that reasonably could have been expected to prevent the proscribed "use" of the facility, the discharge of oil or other hazardous substances. The inquiry ought to be at an end.

Coastal submits that the argument raised by Respondent in the courts below that the monetary penalty satisfies the *Nebbia* test because it was Congress' purpose to raise money for the revolving fund is an excuse conceived out of the recognition that the imposition of a monetary penalty for discharges resulting

solely from the act of third parties has no substantial relation to any deterrent, punitive or regulatory purpose. Certainly, a penalty or a forfeiture that has no relation to Congress' goal of deterring and preventing discharges serves no regulatory purpose and cannot be justified because the money is to be used for a "worthy cause," whether or not that "worthy cause" was conceived by Congress. *Nebbia,* the landmark case cited below by both Coastal and Respondent, requires that a statute under consideration have a reasonable relation to a proper legislative purpose and that it neither be arbitrary nor discriminatory. Even if raising money for the revolving fund was Congress' purpose in establishing Subsection (b)(6), the imposition of a penalty under that subsection may yet be determined to be arbitrary or discriminatory when the *Calero* test is applied. In *Calero,* Justice Brennan cited the case of *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960). That citation to the earlier case refers to a portion of Justice Black's opinion that Justice Brennan considered sufficiently analogous to lend support to his substantive due process analysis. In *Armstrong,* Justice Black stated:

> The Fifth Amendment's guaranty that private property shall not be taken for a public use without just compensation was designed to bar government from *forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.* (Emphasis added)

364 U.S. at 49. Certainly, Justice Brennan was aware that one aspect of the enforcement of foreiture statutes is the raising of revenue. He cited *One Lot Emerald Cut Stones* in footnote 26 of *Calero* at 687 for the proposition that "seizure and forfeiture statutes also help compensate the Government for its enforcement efforts and provide methods for obtaining security for subsequently imposed penalties and fines." The use to which property or its proceeds are to be put after forfeiture, though considered by Justice Brennan, played no part in his due process

analysis. The teaching of *Calero* is that there are some cases in which a person's property may not be taken for any purpose.

And yet, both the District Court and the Court of Appeals held and cited authority for the proposition that Coastal's property could properly be taken as a result of the discharge from its facility caused *solely* by the acts of an unknown third party. Consider the constitutional analysis employed by both courts. Quite property, the Court of Appeals considered the substantive due process standard announced in *Nebbia* in beginning its constitutional analysis. In that case, the Supreme Court stated that in order to satisfy substantive due process requirements, the legislative means must bear a "reasonable relation to a proper legislative purpose" and be "neither arbitrary nor discriminatory." The legislative means is contained in 33 U.S.C. § 1321(b)(6) quoted above, but what is the legislative purpose? In determining that purpose both courts referred to language contained in *Marathon* in which the Seventh Circuit discussed the use to which the proceeds resulting from the imposition of civil penalties are put. As stated by that court, the proceeds are deposited in a revolving fund which is used to finance a National Contingency Plan for the containment, disbursal and removal of spills; the clean-up of maritime disaster; the reimbursement of clean-up costs incurred by owners or operators who are able to establish one of four defenses; and the administration of the act. With the announcement that such proceeds are put to a worthy cause rationally related to the purpose of the act, both courts brought their constitutional analysis to a close, a conclusion that Coastal contends falls one step short.

4. Decisions Conflict with Supreme Court Authority

The *Calero* case, which contains crucial limiting language defining the scope of substantive due process in cases of penalties or forfeitures, was cited and discussed at length by Coastal both in brief and in argument and was cited in *Marathon* for the general proposition that the basing of a penalty or forfeiture on

the ownership of the offending thing does not, without more, violate due process, but neither the District Court nor the Court of Appeals cited or discussed *Calero* in their opinions. In *Calero,* Justice Brennan's great warning to those who would seek to carry the imposition of penalties and forfeitures too far teaches that forfeitures and penalties cannot be constitutionally applied to one who proves not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property. This great warning has been heard and applied in the First Circuit in two recent cases. *United States* v. *One 1975 Pontiac LeMans,* 621 F. 2d 444 (1st Cir. 1980); *United States* v. *$6,700,* 615 F. 2d 1 (1st Cir. 1980).

For whatever reason, neither court below saw fit to apply the *Calero* standard although the uncontroverted facts have established this case to be precisely the kind of case to which Justice Brennan was referring.

Even if it were assumed that the proceeds of all penalties or forfeitures were applied to fund the enforcement and administrative costs of worthy regulatory schemes, the fundamental fairness of the taking of Coastal's property must be measured in the light of the particular event advanced by the government to justify the taking. In the narrow category of cases in which the acts of a third party are involved, *Calero* is the appropriate test.

5. Reduction of the Penalty

To be sure, the Court of Appeals amended the District Court's judgment and reduced the penalty to $1,000, and, certainly, Coastal is one of a number of affiliated corporations with substantial assets. Coastal could pay the $1,000 penalty without a severe disruption of its business. Counsel for Respondent invited this reduction in the penalty to be assessed both in brief and in argument before the Court of Appeals. Whether Respondent took this action in the good faith belief that the original penalty assessed was too high or in an attempt to change the economics

of a Petition for Writ of Certiorari in this Court, Coastal has no desire to trade its rights under the Fifth Amendment of the United States Constitution in return for $4,000.

CONCLUSION

Coastal respectfully suggests that the Supreme Court of the United States give its careful consideration to a determination of whether or not the substantive due process standard announced in *Calero* ought to be applied to the facts of this case, in which a penalty is sought to be assessed for a discharge of gasoline resulting solely from the acts of an unknown third party.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that this Court grant this Petition for Writ of Certiorari; that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, directing this case to be brought up for review by this Court; and that summarily by per curiam, or upon final review hereof, the decision of the Fifth Circuit be reversed and judgment rendered for Petitioners.

Respectfully submitted,

.....

DAVID S. GAMBLE

WOODARD, HALL & PRIMM
300 Esperson Building
Houston, Texas 77002
(713) 224-5171

Attorneys for Petitioners,
Coastal States Crude Gathering Company

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COASTAL STATES CRUDE GATHERING COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

We hereby certify that on the .... day of ....., 1981, three copies of the above and foregoing Petition were served upon the Solicitor General of the United States by placing same in the United States mail, postage prepaid, sent certified mail, return receipt requested and addressed to Solicitor General, Department of Justice, Washington, D.C. 20530 and upon the Respondent's attorney of record by placing same in the United States mail, postage prepaid, sent certified mail, return receipt requested and addressed to Mr. Martin Matzen, Attorney, Appellate Section, U.S. Department of Justice, 10th & Pennsylvania Avenue, N.W., Washington, DC 20530.

.....
DAVID S. GAMBLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COASTAL STATES CRUDE GATHERING COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

Coastal States Gas Corp.
Five Greenway Plaza East
Houston, TX 77046

Attn: Mr. David S. Gamble

Re: COASTAL STATES
7 June 1977

Dear Sir:

A complete review of the file on the above captioned case has been made and after considering all matters concerning the incident including those presented at the informal hearing on 12 September 1977 and in your letters of 4 August 1977 and 13 September 1977 it has been determined that a violation did in fact occur on waters subject to the Act as a result of the discharge of approximately 218,400 gallons of gasoline into Nueces Bay, Corpus Christi, Texas on 7 June 1977 from a Coastal States Crude Gathering Company pipeline.

The Federal Water Pollution Control Act Amendments of 1972, which took effect on 18 October 1972, deleted the word "knowing" from the prohibition against discharges. In determining whether there has been a violation of 33 USC 1321(b)(3) therefore, questions of negligence are no longer relevant. However, in determining the amount of the civil penalty to be assessed the Hearing Officer weighs the gravity of the violation and thereby considers the question of culpability, and to a lesser degree the quantity of the spill. Based upon the evidence presented to me, I find that the primary cause of the discharge involved no negligence on your part.

The law requires that the penalties be assessed against the owner or operator of the vessel or facility from which the oil is discharged and does not permit taking action against any other party or parties.

It is required by 33 USC 1321(6) that any owner or operator of any vessel, onshore facility or offshore facility from which oil

or a hazardous substance is discharged in violation of the Federal Water Pollution Control Act *shall* be assessed a civil penalty. Therefore, in every case where sufficient proof of violation and identity of source exists, a civil penalty *must* be assessed.

To carry out the intent of the law it is the policy of the Coast Guard to assess meaningful penalties. In this case I have carefully considered the evidence you have submitted and it has become apparent that the gravity of the violation is less than originally reported, therefore, the proposed penalty is reduced to $1,000.00 and is hereby assessed.

Payment may be made by check or money order payable to the U. S. Coast Guard, and forwarded with a copy of this letter to the above address, marked for my attention.

You are entitled to appeal this action to the Commandant, United States Coast Guard, Washington, D.C. Should you decide to do so, the appeal must be submitted to this office. It will then be forwarded to the Commandant together with the entire case file. This appeal should include the reason or reasons why you consider this penalty action inappropriate.

Your payment or letter of appeal must be received in this office by 30 days from the date of this letter othewise this case is subject to referral to the Department of Justice for collection.

Sincerely yours,

JOHN T. ROUSE
Captain, U.S. Coast Guard
Hearing Officer
Marine Safety Division
By direction of the Commander
Eighth Coast Guard District

Copy to:
CCGD8(fac)
MSO Corpus Christi

Coastal States Crude Gathering Co.
Attn: David S. Gamble, Esq.
5 Greenway Plaza East
Houston, Texas 77046

Gentlemen:

The Commander, 8th Coast Guard District, New Orleans, Louisiana, has forwarded the file in Penalty Case No. 8-20631-77/p, including your appeal as owner of the Coastal States pipeline, Nueces Bay, Corpus Christi, Texas. The appeal is from the action of the District Commander in assessing a penalty of $1,000 against the company under the authority of section 1321(b)(6) of Title 33, U.S. Code (section 311(b)(6) of the Federal Water Pollution Control Act) for violation of section 1321(b)(3) which prohibits the discharge of oil in harmful quantities into or upon the waters of the United States. The assessment was based on the finding that a harmful quantity of oil, estimated at 50,200 [sic] barrels, was discharged from the facility into Nueces Bay, on 7 June 1977. The discharge occurred when an underground pipeline broke. Your appeal is denied for the reasons stated below.

On appeal you assert that 33 U.S.C. 1321 is unconstitutional as applied to the facts of this case. To buttress this argument, you contend that assessing a penalty for a discharge caused by a third party is violative of constitutional provisions prohibiting the taking of property without due process. You also assert that assessment of the penalty "punishes an innocent party and provides no benefit to the public." Alternatively, you request mitigation of the penalty to one cent ($0.01) arguing that such a fine would "more accurately reflect the extent of costs to the public" and culpability of the company. You also assert that the primary intent of the law is to provide the government with a means of raising revenue.

It is the mandate of Congress as expressed in the Federal Water Pollution Control Act that there shall be no discharges of oil into or upon the waters of the United States. The Act provides that a penalty of not more than $5,000 shall be assessed against the owner or operator of any vessel or facility from which oil is discharged in harmful quantities. The statute requires that the following factors be considered in determing the amount of the penalty to be assessed: the appropriateness of the penalty to the size of the business of the owner or operator; the effect on the owner's or operator's ability to continue in business; and the gravity of the violation. It is not necessary to find intent or negligence, as the law prohibits *any* discharge of a harmful quantity of oil.

In *U.S.* v. *Eureka Pipeline Co.*, 401 F. Supp. 934 (N.D.W.Va., 1975), the court, in an action to collect nineteen civil penalties assessed under the Federal Water Pollution Control Act, reviewed the Coast Guard's penalty assessment procedures. The court noted that to consider the "size of business" did not violate the equal protection clause, that there is no due process deprivation in not allowing certain defenses, and that the definition of harmful quantity is neither arbitrary nor capricious. In summary, the court upheld the constitutionality of the civil penalty assessment procedures and felt that the penalties in the cases before the court were just and reasonable.

In connection with your claim of third party negligence, you are advised that section 1321(b)(6) does not provide for assessing penalties against parties other than the owner or operator of the vessel or facility from which the discharge occurs. These civil penalty provisions of the FWPCA constitute a strict liability system in which allegations of third party fault do not provide an affirmative defense. Such matters are considered in mitigation of the penalty along with all the other facts of the spill.

In a case such as this, involving over 200,000 gallons of spilled oil, the gravity of the violation was quite severe even though your

company's fault may have been minimal. In other circumstances, the maximum penalty for such a large spill would have been proper. However, in this case, the Hearing Officer's mitigation of the penalty to 20% of the maximum indicates that he considered your arguments and reduced the penalty accordingly. Hence, further reduction of the penalty for the same reasons is unwarranted.

The section 311 penalty system is not unconstitutional because it embodies strict liability. This is a recognized and legitimate option open to Congress. Nor does the system "punish innocent parties" while failing to provide public benefit. Rather, the FWPCA, with its penalty provisions, is a legislative system enacted by Congress to reduce oil discharges, thereby minimizing the potential danger to the public health and welfare, and to provide a fund for the removal of discharged oil.

Your request for further mitigation of the penalty is also rejected. Penalty assessments are not levied solely to reflect the costs to the public or culpability of the alleged offender. As previously noted, the penalty provisions are the Congressionally sanctioned methods for discouraging the discharge of oil or other hazardous substances into the nation's waterways, for encouraging greater preventive measures, and for replenishing the spill cleanup fund. Your assertion that the penalty procedure is a revenue raising provision is not a legal basis for finding the statute invalid. Rather, this is a judicially approved method for placing some of the financial burden of cleaning up oil spills on those who own and operate discharging vessels and facilities. *U.S.* v. *LeBeouf Bros. Towing Co., Inc.*, 537 F.2d 149 (5th Cir. 1976; *U.S.* v. *Atlantic Richfield Co.*, Civ. No.75-3096 (E.D.Pa. 1977).

I have reviewed the arguments raised in your appeal and find that proper consideration has been given to the applicable provisions of law in evaluating the facts in this case. The assessed penalty of $1,000 is approved.

The penalty of $1,000 is due and must be paid within 30 days from the date of receipt of this letter. Payment should be made by check or money order payable to the U.S. Coast Guard and forwarded to the Commander, 8th Coast Guard District, Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana 70130. Failure to make payment within the period prescribed will result in the case being forwarded by the District Commander to the U.S. Attorney for appropriate action.

Sincerely,

G H. PATRICK BURSLEY
RADM, U.S. Coast Guard
Chief Counsel

B-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COASTAL STATES CRUDE GATHERING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

B-2

IN THE

District Court of the United States

FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA

v.

COASTAL STATES CRUDE GATHERING COMPANY

C.A. No. C-79-50

MEMORANDUM AND ORDER

This is a civil action brought by Plaintiff, United States of America, against Defendant, Coastal States Crude Gathering Company (hereinafter referred to as "Coastal") for a violation of the Federal Water Pollution Control Act Amendments of 1972, Title 33, United States Code, Section 1321(b)(3). Plaintiff seeks to enforce a $5,000.00 "civil" penalty against Coastal pursuant to Title 33, United States Code, Section 1321(b)(6). Both Plaintiff and Defendant have filed motions for summary judgment. Plaintiff's motion arguably could be treated as a motion for judgment on the pleadings pursuant to Rule 12(c), Federal Rule of Civil Procedure, as Plaintiff's motion refrains from referring to or relying upon any matters outside the pleadings. However, the Court has considered matters outside the pleadings in disposition of both pending motions, namely, the affidavit of N. C. Turner attached to Defendant's motion for summary judgment, and therefore Plaintiff's motion will be treated as a motion for summary judgment.

Having carefully considered both motions for summary judgment, the Court has concluded that Plaintiff's motion for summary judgment should be granted and Defendant's motion for summary judgment should be denied.

Both parties agree that there is no genuine issue as to any material fact in this case. On or about June 7, 1977, approximately 5,200 barrels of gasoline were discharged into Nueces Bay, near Corpus Christi, Texas, from a product pipeline known as the Houston 12-inch pipeline owned and operated by the Defendant. The gasoline escaped from the pipeline through a small "hairline" fracture at a point well outside the navigational channel in Nueces Bay. At the point of the fracture in the pipeline, Nueces Bay was at least four feet deep, and the pipeline was buried at a depth of at least three feet below the bottom of the Bay. The pipeline in question had been installed by the Defendant in accordance with all applicable governmental regulations and standard industry practice.

It seems that the discharge resulted solely from the acts of an unknown third party. Inspection of the pipeline, conducted immediately after the discharge was discovered, revealed that the leak was caused when the pipe was struck by a vessel owned by an unknown third party traveling well outside the navigation channel in Nueces Bay. The vessel struck the pipeline with enough force to penetrate the two inches of concrete in which the pipeline had been encased and to dent and gouge the body of the pipe.

Title 33, United States Code, Section 1321(b)(6) provides in pertinent part:

> "Any owner, operator, or person in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. . . . no penalty shall be assessed unless the owner or operator charged shall have

> been given notice and opportunity for a hearing on such charge. . . . In determining the amount of the penalty . . . the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue business, and the gravity of the violation, shall be considered by the Secretary."

Even if all the facts alleged in Defendant's motion for summary judgment, the attached affidavit, and the accompanying brief are true, Plaintiff is, nevertheless, entitled to a judgment as a matter of law since a violation of the Federal Water Pollution Control Act Amendments of 1972 has occurred. Defendant does not dispute the fact that said violation occurred. Rather, Defendant's position is that summary judgment should be granted in its favor because the provisions of subsection (b)(6) are unconstitutional as applied to the circumstances of this case. Specifically, Defendant argues that substantive due process dictates that defendant may not be held for a monetary penalty as a result of the acts of an unknown third party over whom Coastal had no control and whose act of striking and fracturing the Houston 12-inch pipeline Defendant Coastal could not have reasonably expected to prevent.

The language of Section 1321(b)(6) does not provide for third party or other defenses to the civil penalty. Under the absolute liability standard here involved, neither fault nor defect need be proved and the courts have repeatedly upheld this statute. *United States* v. *Tex-Tow, Inc.*, 589 F.2d 1310 (7th Cir. 1978); *United States* v. *Marathon Pipe Line Co.*, 489 F.2d 1305 (7th Cir. 1978); *United States* v. *Chevron Oil Co.*, 583 F.2d 1357 (5th Cir. 1978). The civil penalty has certain, non-deterrent, economic purposes which are rationally served by an absolute liability standard. The penalties collected from Section 1321(b)(6) violations go into a revolving fund maintained by the government to defray the costs of administration and cleaning up oil spills in situations where the clean-up costs are otherwise

not recoverable — where spills are unreported, caused by acts of God, or committed by financially insolvent persons. It has been held that there is a rational nexus between the behavior penalized in Section 1321 and the purpose of that revolving fund. *United States* v. *Atlantic-Richfield Co.*, 429 F. Supp. 830, 840 (E. D. Penn. 1977). The intent of Congress, as manifested in Section 1321 taken as a whole, is to impose substantial civil penalties on owners or operators even in the absence of fault, and such an intent is within the constitutional powers of Congress. *United States* v. *Marathon Pipe Line Co., supra,* at 1308. Defendant's substantive due process rights were not violated by this provision.

The Court has concluded that since each of the elements which must be established in order to assess a penalty under Section 1321(b)(6) has been established, and since there are no genuine issues as to any material fact, Plaintiff is entitled to a judgment against the Defendant as a matter of law.

It is accordingly ORDERED that Defendant's motion for summary judgment is denied; that Plaintiff's motion for summary judgment is granted; and that Plaintiff is entitled to a judgment in its favor, without cost; and

It is further ORDERED that the Defendant pay to Plaintiff a civil penalty in the amount of Five Thousand Dollars ($5,000,000).

IT IS SO ORDERED.

SIGNED this 11th day of April, 1980.

.....

UNITED STATES DISTRICT JUDGE

B-6

IN THE

District Court of the United States

FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA v. COASTAL STATES CRUDE GATHERING COMPANY	C.A. No. C-79-50

FINAL JUDGMENT

For the reasons stated in the Memorandum and Order entered on even date, final judgment is hereby entered for the Plaintiff, United States of America, against the Defendant, Coastal States Crude Gathering Co., for civil penalties in the sum of Five Thousand Dollars ($5,000.00), together with interest and costs.

IT IS SO ORDERED.

SIGNED this 11th day of April, 1980.

.....

UNITED STATES DISTRICT JUDGE

C-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COASTAL STATES CRUDE GATHERING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

C-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

COASTAL STATES CRUDE GATHERING COMPANY,

Defendant-Appellant.

No. 80-1533.

United States Court of Appeals,

FIFTH CIRCUIT,
Unit A

April 27, 1981.

Before INGRAHAM, POLITZ and WILLIAMS, Circuit Judges.

POLITZ, Circuit Judge:

Coastal States Crude Gathering Company (Coastal) appeals a summary judgment in favor of the United States enforcing a "civil" penalty in the amount of $5,000 against Coastal pursuant to 33 U.S.C. § 1321(b)(6). We amend the judgment to provide for a penalty of $1,000 and, as amended, affirm.

Finding no genuine issue of material fact, the district court summarized the facts as follows:

> Both parties agree that there is no genuine issue as to any material fact in this case. On or about June 7, 1977, approximately 5,200 barrels of gasoline were discharged into Nueces Bay, near Corpus Christi, Texas, from a product pipeline known as the Houston 12-inch pipeline owned and operated by the Defendant. The gasoline escaped from the pipeline through a small "hairline" fracture at a point well outside the navigational channel in Nueces Bay. At the point of the fracture in the pipeline, Nueces Bay was at least four feet deep, and the pipeline was buried at a depth of at least three feet below the bottom of the Bay. The pipeline in question had been installed by the

> Defendant in accordance with all applicable governmental regulations and standard industry practice.
>
> It seems that the discharge resulted solely from the acts of an unknown third party. Inspection of the pipeline, conducted immediately after the discharge was discovered, revealed that the leak was caused when the pipe was struck by a vessel owned by an unknown third party traveling well outside the navigation channel in Nueces Bay. The vessel struck the pipeline with enough force to penetrate the two inches of concrete in which the pipeline had been encased and to dent and gouge the body of the pipe.

In brief and in oral argument counsel for Coastal forcefully contends that the imposition of a monetary penalty on Coastal for a discharge resulting solely from the acts of an unknown third person violates the Fifth Amendment proscription against the taking of property without due process of law. The district court rejected this contention, upheld the constitutionality of the statute, granted summary judgment to the United States and ordered Coastal to pay a civil penalty of $5,000. We likewise find that the statute is constitutional, both on its face and as applied.

Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) making the following unequivocal declaration of policy in 33 U.S.C. § 1321(b)(1):

> The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone. . . .

Section 1321(b)(3) prohibits the "discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States . . . in such quantities as may be harmful." Congress prescribed various remedies and penalties, including the civil penalty established by § 1321(b)(6). Under this section, after notice and an opportunity for a hearing, the Secretary of the department in which the Coast Guard is operating shall assess a

civil penalty of up to $5,000 for each violation of § 1321(b)(3) by any owner, operator, or person in charge of an onshore facility, offshore facility or vessel from which oil or a hazardous substance has been discharged. In determining the amount of the civil penalty the section directs the Secretary to consider three factors: "the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation."

Section 1321(b)(6) provides no defense to the assessment of the civil penalty; indeed, it establishes an absolute liability standard which obviates the need for a finding of fault. By way of contrast, one of the other remedies contained in the Act, liability for clean-up costs, does provide certain defenses. Under § 1321(f) the owner or operator of a facility or vessel from which there has been a discharge may defend against a claim that it is liable for clean-up costs by showing that the discharge was caused solely by an act of God, an act of war, negligence on the part of the United States Government, or an act or omission of a third party.

[1] The district court properly held that this statutory scheme, as applied to impose a civil penalty upon the owner of a discharging facility regardless of fault, is not violative of the Fifth Amendment due process clause. To evaluate properly the legislation we must look to the whole of the statutory scheme. The proceeds resulting from the imposition of civil penalties, as noted by our colleagues in the Seventh Circuit:

> are to be deposited in a revolving fund which is to be used to finance a National Contingency Plan for the containment, dispersal, and removal of spills; the clean-up of maritime disaster discharges; the reimbursement of clean-up costs incurred by owners or operators who are able to establish one of the four defenses; and the administration of the act.

United States v. *Marathon Pipe Line Co.* 589 F.2d 1305, 1309 (7th Cir. 1978). *See* 33 U.S.C. § 1321(c), (d), (i), (k), and (l).

[2] In order to satisfy due process requirements, the legislative means must bear "a reasonable relation to a proper legislative purpose" and be "neither arbitrary nor discriminatory." *Nebbia* v. *New York*, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940 (1934). The statutory provision under challenge here satisfies these criteria. We concur with the Seventh Circuit's conclusion expressed in *Marathon Pipe*, 589 F.2d at 1309:

> The purpose of the FWPCA and of section 1321 is to achieve the result of clean water as well as to deter conduct causing spills. The civil penalty serves the Act's goal of pollution-free water by providing a means of funding the administration and enforcement of the Act.

[3] The intendment of the statute is clear: Congress places a major part of the financial burden for achieving and maintaining clean water upon those who would profit by the use of our navigable waters and adjacent areas, and who pollute same. We find this shifting of the burden from the public to the offending users — albeit good faith, non-negligent users — to be a valid exercise of congressional powers. The imposition of a civil monetary penalty, on a strict liability basis, is reasonably related to the purposes of the statutory scheme and is not unconstitutional.

[4] The Secretary assessed a fine of $1,000 after obviously weighing and considering the three statutory criteria. We are persuaded that the third factor, the gravity of the violation, was given substantial consideration as indeed it should have been. Coastal built and maintained its pipeline in accordance with all prevailing governmental rules and regulations and industry practices; it bore no fault in the rupture and discharge and immediately corrected the leak and pursued available measures to clean up the affected area. The Secretary was quite apparently impressed by this and set the penalty at twenty percent of the maximum allowed. We consider this assessment

fair and just. In the complaint filed by the government, the penalty prayed for was the maximum available under § 1321(b)(6). We think the prayer and judgment for $5,000 was the result of inadvertence. Regardless, under the circumstances reflected in this record we believe the civil penalty of $5,000 is inappropriate and find appropriate the $1,000 as originally assessed by the Secretary. The judgment will be modified to assess a penalty of $1,000.

The judgment of the district court is AMENDED and, as amended, AFFIRMED.

D-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COASTAL STATES CRUDE GATHERING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

33 USC § 1321(b)

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), in harmful quantities as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges of oil into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), were permitted under the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended, and (9B) where permitted in quantities and at times and locations or under circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued

under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(6) Any owner, operator, or person in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. Any owner, operator, or person in charge of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, and any owner, operator, or person in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) who is otherwise subject to the jurisdiction of the United States, shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the fiiing of a bond or other surety satisfactory to such Secretary.

E-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COASTAL STATES CRUDE GATHERING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

APPENDIX "E"
LIST OF AFFILIATED CORPORATIONS

The Coastal Corporation
Cody Gas Company
Coastal States Energy Company
Southern Utah Fuel Company
Utah Fuel Company
Alarka Petroleum Company
McCoy Caney Coal Company
Freeburn Corporation
Pounding Mill Coal Company, Inc.
Standard Coal Corporation
Kentucky Coal Service, Inc.
Coastal Oil & Gas Corporation
Coastal Congo, Inc.
Coastal Libya Exploration Limited
Coastal Congo Exploration Limited
Coastal Cameroon Onshore, Inc.
Coastal Indonesia, Inc.
Syrian American Oil Corporation (Texas)
Border Exploration Company
Coastal Uranium, Inc.
Coastal Papua New Guinea Exploration, Inc.
Western Enterprises, Inc.
CLU Enterprises, Inc.
Coastal Capital Corporation
Coastal Finance Corporation
Coastal Overseas Finance Ltd.
Coastal Financial B.V.
Coatal Financial Antilles N.V.
Coastal Offshore Insurance Ltd.
Colbourne Insurance Company Limited
Colorado Interstate Gas Company
Cig Exploration, Inc.
Coastal Limited Ventures, Inc.
Coastal 1981 Development Program, Ltd.
Coscol Petroleum Corporation
Costa Petro
Euro Trading Company
Coastal Chartering, Inc.
Coastal Libya, Inc.
Coastal Petroleum (Far East) PTE Ltd.
Resolute Maritime, Inc.
Coscol Marine Corporation
Sequoia Tankers, Inc.
Texas Tank Ship Agency, Inc.
Coskan Shipping Co., Inc.

Petroles D'Outre Mer S.A.
Holborn Oil Trading Limited
Lighterage Corporation
Seaspir Corporation
Intrepid Marine, Inc.
Stonehurst Limited
Holborn Oil Company Limited
Coastal (Bermuda) Limited
Geogas Enterprise S.A.
Union Oil Trading & Shipping Limited
Holborn Petroleum S.A.
Bunyan Charterers Ltd.
Coastal States Europe Limited
Holborn-Pomona Petroleum Limited
Pomona Shipping Company Limited
Succula Limited
Woodstock Shipping Company Limited
Subtype Limited
Coastal States Exploration Services Limited
Coastal States Trading (U.K.) Limited
Coastal States Petroleum (U.K.) Limited
Coastal Refining Company
Coastal States Petroleum Company
Coastal States Crude Gathering Company
Coastal States Marketing, Inc.
Coastal Ventures, Inc.
Coastal Refinery Holland B.V.
Belgische Petroleum Raffinaderij N.V.
Coastal Energy Corporation
Coastal Refinery Marketing B.V.
CIC Industries, Inc.
Wycon Chemical Company
Western Fuel Oil Company
Pacific Refining Company
Derby Refining Company
Jayhawk Pipeline Corporation
Cosbel Petroleum Corporation
Belcher New England, Inc.
The Belcher Company of New York, Inc.
Belcher Oil Company
Belcher Terminals, Inc.
The Belcher Company of Alabama, Inc.
The Belcher Company of Georgia, Inc.
Belcher Oil Company of Pensacola
The Belcher Company of Tennessee, Inc.
The Belcher Company of Texas, Inc.
Belcher Towing Company
Coastal States Management Corporation

Coastal States Trading, Inc.
Texcol Gas Services, Inc.
Wyoming Gas Supply, Inc.
Coastal Christi, Inc.
Coastal Hercules, Inc.

Office-Supreme Court, U.S.
FILED
AUG 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2149

In the Supreme Court of the United States

OCTOBER TERM, 1980

COASTAL STATES CRUDE GATHERING COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 5

Exxon Corp. v. *Governor of Maryland*, 437 U.S. 117 4

Nebbia v. *New York*, 291 U.S. 502 4

United States v. *Marathon Pipe Line Co.*, 589 F. 2d 1305 3

United States v. *Ward*, 448 U.S. 242 ..... 2, 5

Constitution and statutes:

United States Constitution, Fifth Amendment 2, 3

Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 2

Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.* :

- Section 311, 33 U.S.C. 1321 ..... 2, 3
- Section 311(b), 33 U.S.C. 1321(b) 4
- Section 311(b)(3), 33 U.S.C. 1321(b)(3) 2
- Section 311(b)(6), 33 U.S.C. 1321(b)(6) 1, 2, 4, 5
- Section 311(b)(6)(A), 33 U.S.C. (Supp. III) 1321(b)(6)(A) 2
- Section 311(k), 33 U.S.C. 1321(k) 2
- Section 311(*l*), 33 U.S.C. 1321(*l*) 2

Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2467 2

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2149

COASTAL STATES CRUDE GATHERING COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A pipeline owned and operated by petitioner unlawfully discharged approximately 5,200 gallons of gasoline into the waters of the United States (Pet. App. C-2). Petitioner was not at fault; the discharge was caused by an unknown third party (*id.* at C-2 to C-3). Section 311(b)(6) of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. 1321(b)(6), authorized the government to impose a civil penalty of up to $5,000 on petitioner in these circumstances, and the government exacted a penalty of $1,000. Petitioner asserts that Section 311(b)(6) is unconstitutional as so applied.

1. The discharge occurred in June 1977 (Pet. App. C-2). At that time,[1] Section 311(b)(6) provided that the "owner or operator of [the] * * * facility from which oil or a hazardous substance is discharged in violation of [33 U.S.C. 1321(b)](3) * * * shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. * * * In determining the amount of the penalty, * * * the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary." As this Court noted in *United States* v. *Ward*, 448 U.S. 242 (1980), where it held that a proceeding to assess a civil penalty under Section 311(b)(6) is not a "criminal case" for purposes of the Fifth Amendment's Self-Incrimination Clause, the penalties collected under Section 311 are paid not into the Treasury generally but into a fund "used to finance the [costs of] removal, containment, and dispersal of oil and hazardous substances discharged into navigable waters and to defray the costs of administering the [FWPCA]" (448 U.S. at 246; see 33 U.S.C. 1321(k), (*l*)).

The discharge in this case violated 33 U.S.C. 1321(b)(3), and Section 311 permits the penalty to be imposed even if the owner of the facility is not at fault.[2] Accordingly, the Coast Guard assessed a penalty of $1,000 against petitioner, noting that "the gravity of the violation was quite severe

---

[1]Section 311 was amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, and the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2467. The discharge at issue here occurred prior to both amendments; the changes are not material to the issue presented here. Section 311(b)(6) is now found at 33 U.S.C. (Supp. III) 1321(b)(6)(A).

[2]Petitioner concedes both the violation (Pet. App. B-4) and the resulting statutory liability (Pet. 7).

even though [petitioner's] fault may have been minimal. In other circumstances, the maximum penalty for such a large spill would have been proper" (Pet. App. A-5 to A-6).

Petitioner refused to pay the assessment and the government sued to enforce it in the United States District Court for the Southern District of Texas. The district court rejected petitioner's constitutional claim and enforced the penalty,[3] noting (Pet. App. B-4 to B-5):

> The civil penalty has certain, non-deterrent, economic purposes which are rationally served by an absolute liability standard. The penalties collected * * * go into a revolving fund maintained by the government to defray the costs of administration and cleaning up oil spills in situations where the clean-up costs are otherwise not recoverable—where spills are unreported, caused by acts of God, or committed by financially insolvent persons.

The court of appeals affirmed, relying in part on *United States* v. *Marathon Pipe Line Co.*, 589 F. 2d 1305 (7th Cir. 1978). It said that the purpose of the statute was to "place[] a major part of the financial burden for achieving and maintaining clean water upon those who would profit by the use of our navigable waters and adjacent areas * * *. We find this shifting of the burden from the public to the offending users—albeit good faith, non-negligent users—to be a valid exercise of congressional powers" (Pet. App. C-5).

2. Petitioner contends (*e.g.*, Pet. 8-9) that Section 311 violates the Due Process Clause of the Fifth Amendment because it permits a penalty to be imposed on petitioner even though another party caused the discharge. Petitioner

---

[3]Apparently because of a clerical error in the government's complaint (see Pet. App. C-6), the district court fixed the penalty at $5,000. On the government's motion (Pet. 16), the court of appeals reduced the penalty to $1,000 (Pet. App. C-5 to C-6).

recognizes that a statute ordinarily does not violate the Due Process Clause if it "ha[s] a reasonable relation to a proper legislative purpose and * * * [is] neither * * * arbitrary nor discriminatory" (Pet. 14; see *id.* at 8-9, citing *Nebbia* v. *New York*, 291 U.S. 502 (1934); see *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124-125 (1978)). But petitioner asserts that the application of the Section 311(b)(6) civil penalty provision to it in the circumstances of this case was arbitary and bore no relation to any legitimate congressional objective (Pet. 13).

This assertion is without merit. Petitioner could not possibly protest if Congress charged all owners of underwater pipelines a fee in order to defray the expenses of administering an anti-pollution program and of cleaning up after accidents for which no one could be held accountable. Such user fees are familiar in other areas and would undoubtedly be constitutional here; among other things, they would reflect a congressional judgment that the clean-up and administrative expenses should be borne not by the taxpayers generally but by those who profit from the enterprises that give rise to those expenses.

Here, by imposing that fee only on owners whose facilities discharge oil unlawfully, Congress has provided an added incentive for owners to take every possible precaution against such discharges. If a fee were imposed only on negligent polluters, for example, there would be little incentive for owners to take precautions beyond simply avoiding negligence—precautions that Congress could rationally want owners to take; and some owners might be tempted to be careless in the hope that they could later convince a factfinder that they were not. Moreover, by making liable all owners of facilities which discharge oil, Congress has avoided time-consuming inquiries into fault. Thus Section 311(b) serves many of the same purposes as a strict liability recovery in tort law—which can also be exacted from a

party who "did all that reasonably could have been expected to prevent" the damage that results from its activity (Pet. 13)—and it would be wholly implausible to suggest that strict liability doctrines are unconstitutional.

Petitioner contends that the Section 311(b)(6) penalty is a "forfeiture" (*e.g.*, Pet. 5-6) and, as such, is unconstitutional under *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). The remark in *Calero-Toledo* on which petitioner relies is, of course, dictum, for in that case the Court upheld the forfeiture of a yacht used for an unlawful purpose even though the owner "was neither involved in nor aware of the act * * * which resulted in the forfeiture" (*id.* at 664). In commenting that if an owner had taken every precaution to prevent the unlawful use of his property, "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive" (*id.* at 689-690), the Court was plainly concerned with the distinctive aspect of a forfeiture penalty—that it "ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law" (*United States* v. *Ward, supra*, 448 U.S. at 254). In a case dealing with Section 311(b)(6), this Court has held that it is precisely this aspect of a forfeiture that the Section 311(b)(6) civil penalty does *not* possess. 448 U.S. at 254. "[T]he [Section 311(b)(6)] penalty is much more analogous to traditional civil damages" (*ibid.*) than to a forfeiture. Not only is the amount of the penalty relatively small, as petitioner recognizes (see Pet. 16), but Section 311(b)(6) specifically instructs the authorities to consider "the gravity of the violation" and "the appropriateness of [the] penalty to the size of the business of the owner or operator charged [and] the effect on the owner or operator's ability to continue in business * * *." Thus Section 311(b)(6) is specifically designed to prevent a penalty from being excessively harsh or "unduly oppressive." Moreover, petitioner does not contend that the penalty imposed in this case is in fact oppressive.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1981

DOJ-1981-08